



MINUTES

PURCHASE AND CONTRACT STUDY COMMITTEE

Tuesday, February 18, 2014

1:00 p.m.

Room 415, Legislative Office Building

The Purchase and Contract Study Committee met on February 18, 2014, at 1:00 p.m. in Room 415 of the Legislative Office Building. Senator Neal Hunt presided. Members present were Co-Chairs Senator Neal Hunt and Representative Dean Arp; Representative Mike Hager, Tim Bailey, Paul Boney, Paul Coble, Greg Driver, Marshall Gurley, Keith Harrod, and Richard Rohrbaugh. Staff members present were Erika Churchill and Kelly Quick from Research, and Wendy Miller, Committee Assistant. Chairman Hunt called the meeting to order and welcomed everyone. Chairman Hunt then introduced the Sergeant-At-Arms, (Attachment 1). Copies of the agenda, attendance, and visitor registration sheets are attached to these minutes, (Attachment 2, 3, and 4).

Chairman Hunt began by stating that today's meeting would be a continuation of the Committee's fact-finding mission. He further stated that next month's agenda would be to discuss what, if any, legislation might be necessary. Chairman Hunt stated that April's agenda would include discussing, possibly drafting, and voting on the committee's recommended legislation. He concluded his remarks by stating that a May meeting would be called, if needed, to wrap up any loose ends.

Chairman Hunt recognized Representative Arp for comments. Representative Arp stated that he appreciated everyone attending today's meeting.

Chairman Hunt introduced Ms. Norma Houston, UNC School of Government, for a presentation on "Overview of the current public construction contracting statutes". Ms. Houston's presentation materials are attached to these minutes (Attachment 5 and 6).

Chairman Hunt opened the Floor for questions. Representative Arp was recognized.

Representative Arp asked Ms. Houston for clarification on her explanation (page 4 of her presentation) as to a bidder being rejected due to not being responsive even though the point in question is whether or not the bidder is a responsible bidder.

Ms. Houston responded by stating that you could probably also say the bidder was not responsible, but in her opinion, the bid itself is non-responsive because it doesn't substantially conform to the specifications; one of those specifications being that you have to be pre-qualified.

Representative Arp asked Ms. Houston, "If the Committee wanted to put a clarification into law to give municipalities a 'step to stand on', would you say the terminology needed to be similar to, 'if a bidder has not obtained pre-qualification or was not pre-qualified, then those bidders shall be deemed non-responsive'?"

Ms. Houston responded, "Yes, even though it would be the same if you said non-responsive, in my opinion, the correct legal avocation would be to say non-responsive".

For clarification purposes, Representative Arp asked Ms. Houston if she was saying that 'up until that point you really haven't made a determination as to whether or not a company is qualified'.

Ms. Houston responded by stating that is why she takes the position that it is the responsive call. She further stated, "Otherwise, to determine whether or not the bidder was responsible you would have to take the bid, open it, evaluate it, and then make that determination. In my opinion, at that point you have potentially given that bidder an unfair competitive advantage over the other bidders who went through the pre-qualification process and this one did not."

Chairman Hunt recognized Representative Arp for a second question.

Representative Arp asked Ms. Houston if the order of the steps on page 16 of the "Prequalification Method" should be changed to show "Prequalify" and then "Receive" instead of "Receive" and then "Prequalify". He stated that it was his understanding that the "Prequalify" would be before they receive the bids.

Ms. Houston responded that due to space limitations some of the steps had been left out. She further stated that in the initial solicitation the unit of government needs to make sure it is clear in the formal advertisement as to whether or not the project requires "Prequalified" bidders.

Chairman Hunt recognized Marshall Gurley for a question.

Marshall Gurley directed his question to Ms. Houston and asked if there was a way to eliminate the subjectivity in the process.

Ms. Houston responded by stating that most of the Local Governments' processes are fairly objective, but she was not sure if it was possible to make any decision-making process fully objective and rule out all subjectivity. She further stated that the courts have recognized that there will be some subjectivity in the decision-making process of awarding contracts.

Chairman Hunt recognized Mr. Gurley for a follow-up comment.

Mr. Gurley stated that since you are dealing with State taxpayers' money you need to leave the process of competitive bidding as open as possible. He further stated that he feels the requirements of being objective would be easy. Mr. Gurley stated that he feels the problem with the process is that it has too much subjectivity in it and when you add subjectivity into the process it becomes a selective process.

Chairman Hunt recognized Keith Harrod for a question.

Mr. Harrod asked how the full prequalification process application will work out over time. He voiced his concern for start-up contractors ever having an opportunity to do any public work if they couldn't respond to some of the very specific questions that are in the prequalification process. Mr. Harrod further stated that over time he felt there would be a diminishing in the number of opportunities for entrepreneurs that want to start a contracting business. He stated that he felt the industry would be destroyed in the long run and asked how the State would deal with it.

Ms. Houston was recognized and responded that at the School of Government they do not give personal opinions as to whether prequalification is good or bad. However, she stated that she would say the concerns he and Mr. Gurley raised were also the concerns she heard from the County Attorneys when she asked them why they didn't use the prequalification process. Ms. Houston stated that the following concerns were some of the reasons given by County Attorneys as to why they do not use the prequalification process:

- They didn't feel it added anything to the contracting process.
- They are concerned about limiting the pool of competition.
- They are under tremendous pressure from their Local Governing Boards to spend local to the extent that the law allows them to and their limitations and ability to do so.

Ms. Houston further stated that anything that appears to reduce or does reduce the opportunity for competition tends to be frowned on by Local Governing Boards. She stated that at the end of the contracting process, the public owner is still protected from having to award a contract to a completely irresponsible bidder under the lowest, responsive, responsible bidder standard of award. Ms. Houston stated that there is a protection in place for the taxpayers' dollars to make sure you are not awarding a contract to a contractor who is completely incapable of performing the project, while still maintaining competition.

Chairman Hunt thanked Ms. Houston for her remarks and then introduced Dave Simpson, NC Government Relations, Building Director, Carolinas Association of General Contractors (AGC), for a presentation on "Prequalification and construction contracting". Mr. Simpson's presentation is attached to these minutes, (Attachment 7).

Chairman Hunt opened the Floor for questions and/or comments. Hearing none, Chairman Hunt asked for approval of the minutes from the January 15, 2014, Purchase and Contract Study Committee. Paul Boney made a motion to approve the minutes; seconded by Representative Arp. Chairman Hunt asked for the "Ayes" and "Nays". The motion passed and the minutes were approved.

Chairman Hunt introduced Joanne Brooks, Vice President and Counsel, Surety and Fidelity Association of America, for a presentation on “Bonding”. Ms. Brooks’ presentation is attached to these minutes, (Attachment 8).

Chairman Hunt thanked Ms. Brooks for her presentation and opened the Floor for questions and/or comments.

Marshall Gurley was recognized and stated that he appreciated Ms. Brooks making the comment that most projects were lost at bid time. He further stated that back in the ‘80s and ‘90s contractors had a four hour bidding policy that allowed them to evaluate contracts; now they have to make their evaluation in 30 minutes and he feels that is why we see a lot of failures in North Carolina.

Representative Arp was recognized and asked for clarification on whether the threshold for Performance and Payment bonds is \$300,000 or \$500,000.

Ms. Houston was recognized for a response and stated that the threshold for State Agencies was \$500,000 and for Local Governments it is \$300,000 for P&P bonds. She further stated that for Local Governments Statute Article 44A requires P&P bonds of 100% if the project cost is \$300,000 for any contract on that project over \$50,000. For clarification purposes Ms. Houston gave the following example:

“If your project cost is \$250,000, no P&P bonds are required. If your project cost is \$400,000, P&P bonds are required for any single contract within that project that is over \$50,000. If you were to bid multi-prime and you had three contracts that were \$100,000 and one that was \$25,000, the three contracts that were \$100,000 would require P&Ps, but on the \$25,000 contract you are not required by Statute to have a P&P bond.”

Chairman Hunt introduced Brad Gibson, Rutherford, A March & McLennan Agency, for a presentation on Bonding. Mr. Gibson’s presentation is attached to these minutes, (Attachment 9).

Chairman Hunt thanked Mr. Gibson for his presentation and opened the Floor for questions and/or comments.

Hearing none, Chairman Hunt recognized David Crawford, Executive Vice President, North Carolina Chapter of The American Institute of Architects, as the last presenter for the day’s meeting. Mr. Crawford’s presentation was on “Design Build Requests For Quotes”. The materials from his presentation are attached to these minutes, (Attachment 10 & 11).

Chairman Hunt thanked Mr. Crawford for his presentation and opened the Floor for questions and/or comments.

Hearing none, Chairman Hunt stated that the last item on the agenda was “Committee Discussion”. He recognized Representative Arp and asked him to begin the discussion by giving Members a more detailed briefing on where the Committee is heading.

Representative Arp gave the following items as recommendations for Committee discussion at the next meeting:

1. Pre-Qualification
 - a. Definition
 - i. Where applicable
 - ii. How applicable
 - iii. Threshold concept
 1. Prequalification is not a limiting factor. Anybody that can be qualified, should be qualified. Not a selection process.
 - b. Elements of pre-qualification
 - i. If it is to be used; what those incur
 - ii. Procedural items
 1. Give municipalities the legal standing that is consistent with case law.
2. CM@R Clarifications
3. HB857 Clarifications

Chairman Hunt recognized Representative Hager for a comment.

Representative Hager stated that he believed Legislators' focus should be on making sure the State spends the taxpayers' money wisely. He further stated that his focus is to allow more bidders with the appropriate skills, while assuring the best job for the best price; not just the cheapest price. Representative Hager added that efficiency and effectiveness needs to be maintained throughout the prequalification process.

Chairman Hunt responded by commenting that he believed this is one of the items that the Committee may need to consider; "How much prequalification effort are Bonding and Surety Companies already doing?" Chairman Hunt stated that it seems to be the same process that the state is using.

Representative Hager stated that he agrees Surety Companies are guaranteeing that projects get done, but they do not guarantee that the job will be done at the best cost for taxpayers.

Chairman Hunt asked Ms. Brooks how a person could determine whether or not a Bonding Company was qualified and not a "flim-flam" Bonding Company as she mentioned in her presentation.

Ms. Brooks responded by stating that you need to make sure the company is licensed by the State.

Chairman Hunt recognized Mr. Gurley for a comment.

Mr. Gurley stated that everyone needs to remember that a project is not just the General Contractor, but a team of people. He further stated that on the projects he has seen fail over the years it was because of the team of people; not just one individual.

Paul Coble was recognized for a question and asked Representative Arp if the Committee was planning to cover the timing in Section 1 G.S 143-64.31.(d).

Representative Arp was recognized and responded by stating yes.

Chairman Hunt stated that the next meeting will be on March 12th at 1:00 pm in Room 544 LOB.

There being no further business before the Committee, the meeting adjourned at 2:50 pm.

Senator Neal Hunt
Chair

Wendy Miller
Committee Assistant